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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 91

Fifty-eighth

58TH STREET PLAZA THEATRE, INC.,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

No.

JEANNETTE BRECHER,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, 58th Street Plaza Theatre, Inc., and Jeannette Brecher, hereby respectfully request this Honorable Court to issue writs of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgments of that court entered in the above

entitled cases on March 18, 1952, pursuant to the majority opinion affirming the decision and orders of The Tax Court of the United States herein.

## Opinions Below.

The findings of fact and opinion of the Tax Court (R. 106-118) are reported in 16 T. C. 468. The majority and dissenting opinions of the Court of Appeals (R. 139-144) have not yet been officially reported.

## Jurisdiction.

The judgments of the Court of Appeals were entered on March 18, 1952 (R. 144-145). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

## Question Presented.

58th Street Plaza Theatre, Inc. (hereinafter sometimes referred to as "Plaza") held a lease on the Plaza Theatre at a rental of $30,000 per annum. On December 29, 1942, effective January 1, 1943, it sublet the theatre to Jeannette Brecher, the wife of its principal stockholder, by a sublease the provisions of which were scrupulously observed and pursuant to which she paid to Plaza a rental of $55,000 in 1943. Jeannette Brecher operated the theatre during the entire year 1943, and, as the Tax Court expressly found, "actually received the net income as her own and used it without restriction for her own purposes" (R. 116). Respondent allocated and taxed *all* of Jeannette Brecher's income from the theatre to Plaza, whose "only relation to the business in 1943 was that of sublessor of the building in which the sublessee operated the theatre" (R. 26, 143).

Respondent also taxed the income from the theatre, undiminished by corporate taxes thereon, to Jeannette Brecher as a dividend from Plaza (R. 40).

The question presented is whether a sublease of business property by a corporation to the wife of the controlling stockholder, pursuant to which the wife actually operated the property and received and retained the income therefrom, may in a collateral tax proceeding be disregarded as sham on the grounds (a) that the consideration to the corporation was less, according to the Tax Court, than could have been obtained in arm's length negotiations and (b) that the change from corporate to individual operation would reduce taxes.

## Statutes Involved.

The pertinent statutory provisions are printed in the Appendix, *infra*, page 20.

## Statement.

On December 29, 1942, Plaza subleased one of its two theatres to Jeannette Brecher for a term of five years commencing January 1, 1943, with provision for renewals (R. 110). Thereupon, Jeannette Brecher assumed and exercised proprietary dominion and control, *i.e.*, she opened a bank account in her trade name in which she deposited all of the box office receipts and from which she paid all of the theatre's expenses, she obtained a license from the City of New York to operate the theatre and Plaza surrendered its license, she secured transfer of the insurance policies on the theatre from Plaza, and entered into contracts for films in her trade name (R. 111). She

actively participated in the operation of the theatre and devoted considerable time to it (R. 111, 116).

Leo Brecher, principal stockholder of Plaza and husband of Jeannette Brecher, acted as manager of the Plaza Theatre both before and after the sublease, for which services he was paid a salary (R. 111).[1] His salary in 1943 from Jeannette Brecher was $6,000 (R. 111).

After payment of costs and expenses, including a rental of $55,000 required by the terms of the sublease, Jeannette Brecher had an income of $40,096.64 left for 1943 before payment of her income tax of $17,084.02 thereon as reported in her return (R. 40, 111). No part of that income was ever received by Leo Brecher or used to discharge any of his obligations (R. 111). Jeannette Brecher received this income as her own and used it without restriction for her own purposes (R. 116).

Leo Brecher owned a majority of the stock of Plaza at all times material to this proceeding and Jeannette Brecher owned 425 shares of such stock before January 4, 1943 and 25 shares thereafter (R. 110, 112). Their two children owned the remainder of the shares (R. 110).

The Tax Court concluded that the sublease was "bad business" *for Plaza* upon the basis of certain stipulated operating data from which the court inferred that Plaza could have obtained more at arm's length than the consideration fixed by the parties (R. 115-116). The court further concluded that prospective tax savings motivated the change from corporate to individual operation (R. 116).

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[1] Besides managing theatres for his own family corporation and his wife, Leo Brecher also managed theatres for outside investors who, however, did not participate in any way in the active operation of the theatres (R. 75). For these services he received 20% of the operating profits as compensation (R. 55, 75). He received approximately equivalent compensation for services relative to the Plaza Theatre (R. 85-86).

The Tax Court's holding that the sublease served no business purpose *of Plaza* implies that the purposes and motives of the parties are relevant. If so, it is pertinent to consider the purposes and motives of the Brechers individually. On this, it is clear, as noted by Judge Swan, that they *intended and carried out* the change from corporate to individual operation which was effected pursuant to the sublease.[2]

The Commissioner, in determining the deficiencies, held (1) that the income reported by Jeannette Brecher was additional income of Plaza, and (2) that such income was taxable also to Jeannette Brecher as a dividend from Plaza (R. 111-112). Accordingly, on the $40,000 of income in controversy, he asserted corporation taxes of $34,000 and individual taxes of $17,000—taxing all of the income, without reduction for Jeannette Brecher's tax thereon, to Plaza and taxing all of the income again, without reduction for

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[2] The evidence as to Jeannette Brecher's motives (the Tax Court's findings are silent on this) is uncontradicted: Her daughter was married in February, 1942, her son enlisted in the armed forces on December 7, 1942, her son-in-law was also in the military service, she testified that she had plenty of time and so returned to the theatre business (in which she had always been intensely interested, having been employed as a girl in a theatre office where she met her future husband) with a view to having an income of her own (R. 49, 74, 91, 98-99). Concerning Leo Brecher's motives, he testified that, fearing a possible heavy judgment against him from a pending suit, he was concerned lest his controlling stock in the family corporation fall into incompetent and hostile hands, with the result that the corporation's business would suffer, and that he was anxious to protect the interests of his children as stockholders (R. 69, 91). Although this testimony was uncontradicted, a footnote to the majority opinion of the Second Circuit below stated that Leo Brecher had more than adequate assets *in addition to his theatre company stock* to pay off any judgment that might be obtained against him. This assertion is not based on findings of the Tax Court and, in our opinion, is unsupported by the evidence.

Plaza's taxes thereon, to Jeannette Brecher (R. 17-29, 37-40).[3]

The Tax Court sustained the Commissioner's determination on the basis (a) of its conclusion that the sublease served no business purpose *of Plaza* and (b) of its inference that the transaction was motivated by prospective tax savings (R. 112, 116). The Court of Appeals affirmed, the majority opinion, written by Judge Frank, holding that the instant transaction, in that it reduced taxes and involved members of an intimate family group, was (R. 140)[4]

> "* * * a 'sham,' a 'disguise,' a 'masquerade,' a 'fiction,' a 'subterfuge,' a 'make-believe,' a 'mere pretense,' a 'mask,' a 'screen,' a 'veil,' an 'artifice,' a 'ruse,' or other names, supplied by the dictionary, * * *"

Chief Judge Swan, taking the contrary view in his dissent, stated (R. 143-144)[5]:

> "* * * The sublease created valid legal relations which the parties thereto intended should be carried out, and they were. * * * The present decision, at least by implication, seems to mean that once

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[3] The amount of Jeannette Brecher's earned income credit is one of the issues, the amount of the credit depending on whether her income is held to be dividends or earnings (R. 33, 117). Accordingly, it is necessary to associate Jeannette Brecher's case with that of Plaza in the instant petition.

[4] This language taken by the Second Circuit from its previous decision in *Kocin* v. *U. S.*, 187 F. 2d 707.

[5] We have refrained from arguing a point to which passing reference was made in the opinions of the Second Circuit below, namely, the question whether Jeannette Brecher's income could have been taxed to Leo Brecher, or to him and the other stockholders in proportion to their stock ownership. Respondent raised no such issue in the pleadings, and the evidence introduced was not calculated therefore to meet any such challenge. We suggest, however, that the income from an investment property such as an apartment house, hotel or theatre, after payment of expenses including the manager's compensation, belongs to the proprietor, not to the manager.

a man starts doing business in corporate form, he may not discontinue it and resume operations in his own name, or that of his nominee, so far as federal taxes are concerned. * * *"

## Reasons for Granting the Writs.

This case presents a question of fundamental and continuing importance in the functioning of the tax laws: Whether property rights, created by an appropriate legal instrument, intended to be and, in fact, carried out and given substance by the conduct of the parties, may be disregarded as sham by respondent because the transaction creating such rights was between members of an intimate family group, a larger consideration might have been obtained in arm's length negotiations, and the effect was to save taxes. Implicit in the issue is the question whether taxpayers may conduct business in accordance with their own election or whether, having once chosen to do business as a corporation, they are precluded from changing back to individual operation.

In his dissenting opinion Chief Judge Swan stated that the case "goes further than previous decisions of the Tax Court" and carries too far "the rapacity of tax-gatherers." He also pointed out that the majority decision disregards what the parties intended and did.

The writs of certiorari should issue because the decision of the Second Circuit is in conflict with decisions of the other Circuit Courts of Appeal.

Aside from the conflict between the circuits, the issue is of particular administrative importance because the Tax Court, which handles the great bulk of all tax litigation, has now for several years, despite repeated reversals by

other circuit courts, continued to sustain respondent's disregard of legitimate transactions among related taxpayers where tax savings were effected. The problem is constantly arising and will continue to arise frequently. The situation is confusing and the conflicting decisions result in discrimination between taxpayers, the end result depending upon the circuit in which they happen to reside.

The decision below is inconsistent in principle, and probably in conflict, with the decisions of this Court.

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1. The decision below is in conflict with the decisions of the Fifth Circuit.[6] In *L. W. Tilden, Inc.* v. *Commissioner*, 192 F. 2d 704, reversing 9 TCM 219, a corporation which owned citrus groves executed a lease of its properties for a period of five years to be operated for the benefit of certain stockholders, all members of the Tilden family. The court emphasized that the corporation did not operate the properties, that the lessee had actually taken over such operation, and that the stockholders for whose account the lease had been executed had received large profits therefrom on which they had paid large taxes, and held that the income of the stockholders from the lessee's operation of the property could not be taxed to the lessor corporation, declaring (pp. 709, 710):

> "We are in complete disagreement with, and find clearly erroneous, the conclusion that what the parties did to realize this result was not a reality but a sham. * * *
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> * * * * * *
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> In the family partnership cases, of which we have written many, one of the most recent being Batman

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[6] The conflict between the Second Circuit's decision herein and the decisions of the Fifth and Ninth Circuits is the subject of an article entitled "Second Circuit Would Penalize Change of Business Form" in the "Taxation Report" of the Research Institute of America, March 27, 1952 issue.

> *v.* Commissioner, 189 F. 2d 107, supporting the point by reference to, and discussion of, authorities, we have carefully pointed out that family arrangements which have substance are just as effective as those made by persons not members of the family. * * *
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> * * * * * *
>
> We think it is the commissioner, not the taxpayer, who puts form above substance when he insists that these transactions fail simply because the Tildens took the course they did to, and they did, save large taxes and with these savings were able to protect the property from the mortgages."

Similarly, the decision below conflicts with *Henson* v. *Commissioner,* 174 F. 2d 846, CA-5, reversing 10 T. C. 491. There, a husband made a gift of his entire interest and ownership in a business to his wife. She employed him as manager of the business and was not normally consulted as to its operation. There, as here, the Tax Court sustained the Commissioner in his disregard of the manner in which the parties elected to carry on the business. Reversing the Tax Court, the Fifth Circuit held (pp. 847, 848) that since the wife had "the absolute right of control over both the property and the income derived therefrom which adheres in a valid and legal title," and since "there are no conditions attached which would enable him [the husband] to retain a legal dominion and control over the property," the income was taxable to the wife alone, and not to the husband.

In *Alexander* v. *Commissioner,* 194 F. 2d 921, reversing 9 TCM 356, the Fifth Circuit declared (pp. 923, 925):

> "If there is any one thing which emerges clearly from the confusion caused by the body of utterances

> and decisions, administrative and judicial, dealing with claimed family partnerships, leading up to and culminating in Commissioner *v.* Tower, 327 U. S. 280, and Lusthaus *v.* Commissioner, 327 U. S. 293, it is that instead of their being examined with an eye single to determining whether in law and in fact they were a reality or a sham, many of them were examined and dealt with with a gaze, focused too much upon the consequences, to the surtax, of recognizing them.
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> * * * * * *
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> This source [of error] has been and is the failure, and sometimes the refusal, of commissioner and Tax Court to recognize and give effect to the difference, on the one hand, between tax evasion, the use of pretenses and forbidden devices to lessen or defeat taxes, and, on the other, tax avoidance, the making of lawful, that is of bona fide and valid, dispositions and arrangements in respect to property and services, with the purpose and result of effecting legally permissible tax savings. Gregory *v.* Helvering, 293 U. S. 465, * * *"

*Cf. Phillips, et al.* v. *U. S.*, 193 F. 2d 132, CA-5, affirming unreported decision of the District Court, and *Britt* v. *Commissioner*, 190 F. 2d 946, CA-5, reversing 9 TCM 26.

2. The decision below is also in conflict with decisions of the Ninth Circuit. The result below was expressly predicated on the Tax Court's conclusion that the sublease was not in the "best interest" of Plaza because it did not afford Plaza as much profit as the Tax Court thought the circumstances warranted. In *Goold* v. *Commissioner*, 182 F. 2d 573, reversing 8 TCM 2, the Ninth Circuit considered a father's sale of a partnership interest to his son, for which the father received a $100,000 note, payable with-

out interest out of the son's share of future earnings, and stated (p. 575):

> "Under existing law, the father had complete freedom, at least up to the date of this writing, to transfer his property in any way he saw fit. So far as the disputed income tax deficiencies are concerned, whether or not the sale was an improvident transaction, is not of the business of the tax collector. The tax collector's apparent opinion that the father should not have sold valuable property to his son without a cash consideration, or that he should not have taken in payment a note payable out of future profits, is utterly immaterial."

The majority opinion below sought to distinguish the Ninth Circuit's decision in the *Goold* case on the ground that no finding of a motive of tax avoidance was involved. But in the later decision of the Ninth Circuit in *Twin Oaks Co.* v. *Commissioner*, 183 F. 2d 385,[1] reversing 8 TCM 280, that court, in the case of a partnership formed by the stockholders to take over the corporation's business and assets, excepting the real estate which the partnership leased, expressly held that a purpose of tax avoidance does not render a transaction sham, stating (p. 387):

> "It is * * * well settled that a taxpayer is free to adopt such legal organization for the conduct of his affairs as he may choose; he may convert from the corporate method to the partnership method of doing business and, though his motive in so doing be to reduce taxes, the conversion must be accorded recognition unless it is such a sham, such a change in form only, without substance, as to require that it be disregarded for tax purposes. Helvering *v.*

[1] This decision is referred to in the March 27, 1952 issue of the "Taxation Report" of the Research Institute of America as in conflict with the majority decision of the Second Circuit here.

> Clifford, 309 U. S. 331. * * * It seems clear to us, however, that the Tax Court, in its characterization of the change in business structure involved in the instant case as a sham and a mere form without substance, has, in effect denied the taxpayers the legal right to conduct their business affairs through a medium of their own choice."

3. Similarly, the decision below conflicts with the views of other circuit courts. The Tenth Circuit reversed the Tax Court for its refusal to recognize the form in which taxpayers elected to carry on business in *John L. Denning & Company, Inc.* v. *Commissioner*, 180 F. 2d 288, reversing 7 TCM 980. In that case, the wife, son and daughter of the taxpayer corporation's majority stockholder formed a partnership to carry on business formerly conducted by the corporation. The Commissioner taxed the income of the partnership to the corporation, and was sustained by the Tax Court. The Tenth Circuit reversed, holding that the income of the partnership belonged and was taxable to the partners and not to the corporation, and further, that Section 45 of the Internal Revenue Code did not authorize the Commissioner to attribute the partnership's income to the corporation, pointing out (p. 291):

> "* * * The holder of the majority of the stock in the corporation owned no interest in the partnership. The partners owned only a minority interest in the corporation. The earnings of the two entities were entirely separate and distinct. The earnings of the partnership arose from the capital, the credit, and the efforts of the partners. The income of the partnership belonged to the partners. Its income was clearly reflected by its records. There was no confusion of the income of the two entities which required any adjustment between them."

In the *Denning* case, where the facts were strikingly similar to those in the case at bar, the Tenth Circuit refused to permit the Commissioner, despite his having expressly invoked Section 45, to allocate *part* of the income or deductions of one taxpayer to a related taxpayer, while in the decision below the Second Circuit sustained the Commissioner in ignoring completely one of the related taxpayers and allocating *all* of her income to the other, without invoking that section. We submit that the views of the Tenth and Second Circuits are squarely in conflict. See also *Visintainer* v. *Commissioner*, 187 F. 2d 519, CA-10, reversing 13 T. C. 805, cert. denied 342 U. S. 858.

In *Greenberger* v. *Commissioner*, 177 F. 2d 990, reversing 7 TCM 346, the Seventh Circuit considered a partnership situation involving a taxpayer, his wife and three trusts for the benefit of their children. The Tax Court, in a decision by Judge Murdock who also decided the instant case, struck down the partnership for reasons similar to those assigned in his opinion in the instant proceeding. The Seventh Circuit, reversing, held that intent was controlling and that the dominant role of the husband in the partnership, plus the fact that the wife and trusts rendered no services, was not important, particularly in view of the fact the husband was paid a salary for his services. See, also, *Wellington* v. *Commissioner*, decided May 15, 1952, CA-7 (not yet officially reported but found in 1952 CCH Standard Tax Service, par. 9318), vacating and remanding 8 TCM 492 and 10 TCM 318, and *Skemp* v. *Commissioner*, 168 F. 2d 598, CA-7, reversing 8 T. C. 415.

In *Brown, et al.* v. *Commissioner*, 180 F. 2d 926, reversing 12 T. C. 1095, cert. denied 340 U. S. 814, the validity of lease agreements was in issue. The Tax Court, as in the instant case, refused to recognize the rights and interests thus created between related taxpayers, even though

the agreements were in fact carried out, and it denied deduction of the rent and royalty payments made pursuant thereto. The Third Circuit reversed, holding that the agreements were legally binding and might not be disregarded. See, also, *Funai* v. *Commissioner*, 181 F. 2d 890, CA-4, reversing 13 T. C. 696, and *Stanchfield* v. *Commissioner*, 191 F. 2d 826, CA-8, reversing 9 TCM 471. We note also that, in a case involving expenses, the Second Circuit recently upheld respondent's refusal to allow deductions among related taxpayers. *E. Field White* v. *Fitzpatrick*, 193 F. 2d 398, cert. denied April 21, 1952. Of course, respondent's power to determine what constitutes "ordinary and necessary" expenses has some basis in the statutes and differs materially therefore from his assumption of power here to attribute and tax the entire income of one person to another.

4. The question whether a transaction is sham because tax savings are thereby effected is important and constantly recurring. The need for correction of the Tax Court which continues to strike down transactions consummated in good faith is indicated by the frequency with which it has been necessary for the several circuits to reverse (some of the cases have been cited, *supra*). Since the Second Circuit supports the Tax Court's views on this issue, such correction may be brought about by granting certiorari in the instant proceedings.

Congress, recognizing the confusion created by respondent's determinations and the Tax Court's decisions, has partially remedied the situation in respect of family partnerships by the enactment of Section 340, Revenue Act of 1951, providing explicitly that interests in partnerships in which capital is material shall be recognized whether created by purchase or gift. However, since the legislation

does not purport to apply to 1950 and prior years and is restricted to family partnerships, it does not prevent respondent and the Tax Court from continuing, as in the instant case, to strike down family transactions, especially those not involving partnerships. Under these circumstances, we submit that this Court is the appropriate agency to effect such further correction as is necessary.

5. The decision below is probably in conflict, or at least inconsistent in principle, with this Court's decision in *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451.[8] The question in that case was whether the profit on sale of corporate assets by the stockholders after distributions in liquidation could be taxed to the corporation. Noting (p. 453) that "the Court of Claims found that the method by which the stockholders disposed of the properties was avowedly chosen in order to reduce taxes," this Court nevertheless held (p. 455):

> "• • • Whatever the motive and however relevant it may be in determining whether the transaction was real or a sham, sales of physical properties by shareholders following a genuine liquidation distribution cannot be attributed to the corporation for tax proposes."

6. The decision below misconstrues this Court's landmark decision in *Gregory* v. *Helvering*, 293 U. S. 465. The *Gregory* case is cited for the proposition that the income of Jeannette Brecher from the operation of the theatre

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[8] This conflict is noted in a recent tax publication criticizing the majority decision below (The Tax Barometer, issue of March 29, 1952):

> "• • • it concerns a basic question of tax law, is in conflict with other circuit court decisions, and is also at variance, at least in principle, with prior Supreme Court decisions, (for example, see Cumberland Public Service, 338 U. S. 451, • • •)."

under the sublease may be taxed to Plaza because the Tax Court found that the sublease was motivated by prospective tax savings. But the *Gregory* case does not hold that a transaction must be disregarded for tax purposes if it be motivated by tax savings. Indeed, in considering the question there involved, this Court (p. 469) expressly "putting aside * * * the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred," held only that on the facts there presented, no reorganization had actually taken place. The Court asserted (p. 469):

> "* * * The legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

Similarly, see *United States* v. *Isham*, 17 Wall. 496, 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395-396.

7. Although the instant case does not present a family partnership situation, it does involve a transaction between a wife and a closely held family corporation, in which her husband was the controlling stockholder. Hence, the principles formulated by this Court in *Commissioner* v. *Culbertson*, 337 U. S. 733, are pertinent, and should not have been ignored by the court below. In the *Culbertson* case this Court established (pp. 742, 743) that the validity of a family partnership depends upon whether, considering all the facts, including the "actual control of income and the purposes for which it is used," the parties had the "bona fide intent * * * to join together as partners." In the instant case it is not disputed that the parties intended Jeannette Brecher to conduct the business of operating the theatre for her own account as sublessee, which she did; moreover, the Tax

Court found as a fact that she received the net income as her own and used it without restriction for her own purposes.

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The Tax Court's reference to the decisions in *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436, and *Higgins* v. *Smith*, 308 U. S. 473, confirms that it misinterprets the views of this Court; the opinion in the *Moline* case expressly stated (p. 439) that: "* * * the corporate form may be disregarded, *where it is a sham or unreal*" and held that the separate entity of the corporation must be accorded recognition under the facts of that case. (Italics ours.) This Court's refusal in the *Smith* case to recognize a loss from a sale by an individual to a corporation of which he was sole stockholder as lacking substance is a far cry from the refusal of the courts below to recognize Jeannette Brecher as the actual operator of the theatre pursuant to the sublease.

## Conclusion.

In conclusion, and accepting fully the facts as found by the Tax Court, we submit that the Tax Court and the Second Circuit erred in regarding a transaction between members of an intimate family group as sham merely because the effect was to reduce taxes and arm's length standards in respect of consideration were not met. The correct view, reflected in the decisions of the other circuit courts and implicit in the decisions of this Court, is that such transactions must be respected taxwise if intended to be carried out and in fact consummated. The harshness of imposing on Plaza approximately $34,000 of taxes on $40,000 of income of its sublessee in addition to $17,000

of individual taxes already collected from the sublessee who received, kept and spent the income, requires no argument. The power to tax does indeed involve the power to destroy.[9] Respondent should not take the property of Plaza to pay taxes on income which it never received and to which it has no claim.

It may be asked why it is again necessary, after the many decided cases in which the circuit courts have clearly stated, consistent with principles recognized by this Court, that real transactions may not be disregarded taxwise, for this Court to review the instant case and restate the controlling principles. The answer is that the review sought herein is necessary because respondent and the Tax Court, so long as supported by the Second Circuit, will continue to limit the application of the broad underlying principle to special pattern situations such as family partnerships (as in the *Culbertson* case, *supra*), cases involving gifts, or cases of corporate distributions *in liquidation* (as in the *Cumberland Public Service Company* case, *supra*). The sharp division in the instant cases between the majority and minority views on what is real and what is sham, both views based on the same findings of fact, shows the need for further clarification. Admittedly, it is proper for respondent to scrutinize closely transactions between related taxpayers which reduce taxes, but this scrutiny should not be permitted to blind taxing officials to the real issue, i.e., whether a transaction is real or pretended.

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[9] It requires no clairvoyance to see the handwriting on the wall for Plaza should this Court fail to grant relief against respondent's asserted power to tax it on the earnings of its sublessee; its insolvency is assured, its destruction imminent.

WHEREFORE, your petitioners respectfully pray that writs of certiorari should be granted.

Respectfully submitted,

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May 27, 1952.

## Appendix.

### Internal Revenue Code.

Sec. 22. Gross Income.

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

Sec. 45. Allocation of Income and Deductions.

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses."

(Sec. 45 before its amendment by Sec. 128(b) of the Revenue Act of 1943, effective January 1, 1944.)

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